# Methods for Financing Transportation Infrastructure

Oregon Department of Transportation
Transportation Development Division
Nancy E. Murphy, Principal Planner

June 29, 2010

Back of Cover Page

## Table of Contents

# Methods for Financing Transportation Improvements

The purpose of this paper is to identify the range of alternatives for local government under current and former Oregon law, and under provisions of other states, that may be worthy of consideration here to finance necessary transportation improvements when state and federal funds are either not timely or not sufficient to meet local needs.

## Background

State and local governments face increasing difficulty finding adequate funding for transportation facility improvements to support new, changing and expanded housing, commercial and industrial development. Both state and local resources are stretched thin due to inflation, rising maintenance costs and the absence of new revenue to support new and redeveloping areas. Existing system capacity is often insufficient to support new development without significant system improvements. Needed improvements can vary in scale from restriping to complete intersection or interchange reconstruction.

Public / private partnerships are sometimes successful when a large development is proposed and transportation improvements can be financed as a reasonable cost of doing business, but this is not always possible. There is a wide-ranging array of issues that have to be considered including available financial resources, limits of law, timing of improvements, and equity. Solutions have to be found that are workable among all the parties; state and local jurisdictions, local stakeholders and developers who both benefit from transportation infrastructure and add to traffic volumes that may cause safety, operations and capacity problems. All of these variables make it difficult to arrive at feasible solutions and fairly share responsibilities among all the parties.

Information in this white paper is primarily from *Financing Mechanisms for Capital Improvements: Interchanges* (SPR 687), a 2010 publication of the PSU Center for Urban Studies and ODOT Research Section.

## Related Case Law

Rulings by Oregon courts have further complicated planning for adequate transportation facilities. In 2004 the Oregon Appeals court ruled (***Jaqua v. City of Springfield***, 193 Or App 573, 593, 91 P3d 817) that the statewide Transportation Planning Rule (TPR) (OAR 660-012) in effect at that time amounted to a “concurrency” requirement. However, it had not been the intent of the rule that all needed improvements had to be in place “concurrent” with private development. Subsequently ODOT and DLCD reworked the TPR to make it unnecessary to have fully completed transportation improvements in place to support development if the necessary transportation improvements were “reasonably likely” to occur during the existing transportation plan period. This policy change lightened the burdens on both state and local government

by allowing consideration of planned improvements when approving land use plan and ordinance changes.

There are limits to the way legislative land use decisions can be approved under the revised TPR (See ***Willamette Oaks vs. City of Eugene*** Court of Appeals, November 18, 2009). In this ruling the Court of Appeals stated that it was impermissible for local government to place conditions on legislative land use amendments that would later subject the approval of a specific land use development project to an additional review step to meet the TPR facility requirements.

# Existing Authorities and Practices in Oregon

Oregon cities and counties have used several methods to generate revenues for transportation improvements not fully funded by state and federal fuel tax revenues. This section briefly describes methods currently in use, plus two that were proposed as legislative concepts in the 2009 Oregon Legislature.

## Traffic Impact Fees (TIF) / Systems Development Charges (SDC)

Oregon law (ORS 223.297 – 223.314) provides "a uniform framework for the imposition of system development charges by governmental units" and establishes "that the charges may be used only for capital improvements." An SDC can be constructed to include one or both of the following components: (1) a reimbursement fee, intended to recover an equitable share of the cost of facilities already constructed or under construction and (2) an improvement fee, intended to recover a fair share of future, planned, capital improvements needed to increase the capacity of the system for future users. Reimbursement fee proceeds can be used for any related capital facility costs, but improvement fees can only be used to fund capacity increasing facilities.[i] For purposes of this paper, SDCs and TIFs are assumed to be two terms for the same type of program.

An SDC program provides a way to distribute the cost of development-related growth and wear on local infrastructure to those directly benefited by infrastructure improvements. An SDC is "a monetary charge imposed by a local government on new development to recoup or offset a proportionate share of public capital costs required to accommodate such development with necessary public facilities."[ii] The use of impact fees to pay for new infrastructure is growing in popularity in municipalities across the country, especially in high-growth areas. For example, 83% of all Florida cities and 90% of California's cities employ some form of impact fee.[iii]

When communities in Oregon decide to adopt SDCs, they are required to follow guidelines laid out in ORS 223.297-223.314 that is intended to "provide a uniform framework for the imposition of system development charges by local governments, to provide equitable funding for orderly growth and development in Oregon's communities and to establish that the charges may be used only for capital improvements." There is

no one standardized methodology for calculating SDCs that local governments are required to use, but rather a set of guidelines to which they must adhere (223.304).

ORS 223.302 stipulates allowable use of SDC revenues. Administrative review procedures must be established that allow any interested person to challenge the expenditures of SDCs. A distinction is made between the ways that reimbursement fees and improvement fees can be spent. Reimbursement fees can only be spent on capital improvements, whereas improvement fees can only be spent specifically on capacity-increasing capital improvements. Transportation SDCs are usually defined as improvement fees.

There is wide variation in methods used to calculate Traffic Impact Fees. Much of the variation in methods of calculating the fees "reflects the different methods of calculating traffic impacts or trade-offs between accuracy and simplicity." [iv]

The SDC rate is based on the cost of building the capacity needed as a result of development-related increase in trips. The Institute of Transportation Engineers (ITE) *Trip Generation Manual* is used as a guide by many local governments to determine trip generation. Land use categories have a number of trips attached to them and are then priced accordingly. For example, a residential land use category may be charged a per number of dwelling units, while a commercial category is charged based on the gross floor area or gross leasable area. For schools, the rate is determined by the number of students, for movie theaters or auditoriums by the number of seats and for service stations the number of vehicle fueling positions. Depending on the complexity of the formula used, the trip generation rate can be adjusted based on various factors such as average trip length; the percentage of trips that represent new trips, and peak versus off-peak.

TIF or SDC rate adjustments in exchange for developer contributions are not usually employed by local governments. In Portland, Oregon however, transit-oriented developments receive a discount, and transportation SDCs may be waived for certain types of affordable housing projects.

## *Examples in Oregon*

A City of Eugene Public Works Department study in 2004 showed SDCs across 18 cities in Oregon varied considerably, with, for example a high of $734,842 in Woodburn to a low of $45, 272 in Newberg for a 47,400 square foot supermarket. All of the cities surveyed based their trip rates on the ITE *Trip Generation Manual.*

### *Bend*

System development charges (SDCs) are fees that are collected to fund a portion of streets and other infrastructure. Transportation SDCs are applicable on all new development, tenant improvements and changes of use as any new development or re-development adds a higher use to the roadways. Based on a trip rate from the ITE Manual, each transportation SDC fee is based on a unit that varies per use. The fee is then calculated by the price per unit listed in the current fee resolution multiplied by the unit of measure (e.g. building square footage).

### *Marion County*

Marion County collects transportation SDCs in both urban and rural areas. SDCs collected inside urban growth boundaries are to be expended in the boundary area where they are collected. Fees collected in rural areas are used for rural projects. SDCs are determined through the planning process. Methodologies were established based on present capacity and forecast future deficiencies. Estimates of increases in travel within the next 20 years and improvement needs were determined to establish SDCs within the UGBs of Salem, Silverton, and Woodburn. A slightly different methodology was used for rural areas.

### *Boardman*

Boardman's Municipal Code Chapter 3.08.050 specifies that reimbursement fees will be based on costs of existing facilities, prior contributions by existing users, the value of un-used capacity, rate-making principals for public capital improvements, and other factors identified by the council. The method also requires that future users are charged an equitable share of cost.

### *Woodburn*

Woodburn's City Ordinance 3-17.5 identifies a method to determine SDCs based on their "Transportation System Development Charges Study." Ordinance 3-17.6 allows rate schedule adjustments based on cost changes every January identified in the *Engineering News Record* Northwest Construction Cost Index.

When determining methodologies for calculating TIFs, there tends to be a tradeoff between the ease of calculation and administration of fees and the preservation of equity among developers. For example, using a simple formula or a flat fee is more transparent and consistent, but is less likely to ensure a developer's payment will directly correspond to the impact of their development on public facilities. More complicated formulas are likely to be better at assigning true cost responsibility, and are more likely to be consistently equitable, but the more complex formulas have higher administrative costs and may not provide developers with the level of certainty they prefer when determining the economic feasibility of future development projects.

## Transportation Utility/Maintenance Fees

Several counties and about 20 cities in Oregon rely on transportation utility fees to generate revenue for road maintenance.[v] With utility fees, local roads are defined as a public utility and road maintenance costs are assigned proportionately to road usage, on the basis of trip intensity or estimated VMT.[vi] These fees can also be set on the basis of a property's square footage or its road frontage length. Generally, the fees distinguish between residential land uses and non-residential land uses. Use of transportation utility fee revenues is typically limited to road preservation, maintenance, repair and operations. However, a transportation utility fee ordinance can be written in Oregon to cover capital improvements as well.

Use of these fees has emerged in Oregon since the 1990s. Road maintenance costs have grown faster than state gas tax revenues. Reliance on general fund revenue to

make up the difference has also been constrained by voter-approved property tax limitations.

As with fees charged for other utility services, transportation fees are set to correspond to the benefits that consumers obtain from utilization of transportation infrastructure. For other utilities, these benefits, known as consumers' surplus, can be determined from direct measurement of the service consumed. However, consumption of transportation capacity is not as easily measurable. Where the equity of transportation utility fees is challenged, for example by car-less households, it is important to note that buses, cabs and delivery vehicles use the roads to serve those households as much or more than they serve households using private vehicles.

## Local Improvement Districts

Local improvement districts (LIDs) are entities created when a group of property owners organize to pay the costs of infrastructure improvements, as enabled in ORS 223. An LID lasts only until the improvement is completed and the debt obligation has been met. An LID is usually created to raise capital for smaller projects, such as installing sidewalks, but can also be formed to finance more substantial infrastructure improvements. For example, an LID was created in Portland to help finance the Portland Streetcar project. Another contributed financing to Portland's transit mall improvements. The City of Wilsonville formed an LID to fund widening of Wilsonville Road in coordination with ODOT ramp improvements at the I-5 interchange.

Determining the financial obligation of property owners in an LID can be based on a variety of methods, including property size and/or frontage length, or trip generation. Methods may also account for the distribution of expected benefits from the particular improvement. For example, the amount of the financial obligations of property owners in the Portland Streetcar and transit mall improvement LIDs declines as distance from the improvements increases.

## Value Capture

Value capture refers to the process by which all or a portion of increments in land value attributed to community efforts/interventions rather than landowner actions are recouped by the public sector. Transportation infrastructure and transportation services confer benefits to system users and to properties with access to these services. Access to transit service is particularly beneficial within congested urban transportation systems. The capitalization of the benefits of access to transportation infrastructure increases property values for residents and businesses, and provides a catalyst for denser and higher value development.

The mechanisms actually employed to collect funds may include tax increment financing, local improvement districts and other forms of financing. Value capture is essentially another way to estimate the fair share contribution of benefited properties.

TriMet's MAX Yellow Line relied in part on value capture financing through Tax Increment Financing funds from the Interstate Corridor Urban Renewal Area. Value capture financing can also occur through the formation of a Local Improvement District. Moreover, it is possible for transit infrastructure projects to involve more than one value

capture financing mechanism. Financing for the Portland Streetcar, for example, involved both TIF and LID funds, while financing for TriMet's light rail extension from the Gateway Transit Center to Portland International Airport included TIF funds from the Gateway Urban Renewal Area, proceeds from the sale of development rights at the Cascade Station location on airport property, and a commitment of future employment tax revenues from TriMet.[vii]

## Local Option Taxes

Local option transportation taxes are taxes that vary within a state, with revenues controlled at the local or regional level and earmarked for specific purposes. Local option taxes can include fuel taxes, vehicle registration fees, sales taxes, and income, payroll and employer taxes. In their research on local option taxes nation-wide, Goldman and Wachs[viii] (*2003*) found that sales taxes are the most commonly employed type.

In Oregon, local option gas taxes are imposed in 2 counties and 17 cities.[ix] The Portland area was among the first regions in the country to adopt a local option tax in 1969 (in the form of a payroll tax) dedicated to supporting its transit provider's operating costs. There are several reasons[x] why local option taxes have become increasingly popular, including active political opposition to property taxes; shrinking gas tax revenues; and the rise in highway construction and maintenance costs.

The Oregon Legislature limited the ability of local governments in Oregon to introduce gas taxes or amend existing gas taxes in the 2009 session. The Legislature enacted HB 2001 (Sections 25-28, Chapter 865 Oregon Laws 2009) which prohibits local governments from enacting new gas tax provisions or from amending existing gas tax provisions until January 2014 when new or amended provisions related to local option gas taxes will be allowed subject to voter approval.

## Tax Increment Financing/Urban Renewal

Tax increment Financing (TIF) is used by local governments to fund public improvements in Urban Renewal Areas (URA) with the intent of encouraging redevelopment and leveraging private investment in blighted areas. TIF is sometimes used to fund transportation projects. The URA is established to define an area in which TIF will be implemented. The amount of taxes available for their current uses (e.g. city operations, capital improvements, schools) is frozen for a set period of time, usually 20-25 years. Based on the assessed value of property inside the URA at the time the URA is established, the increment of the tax above the frozen value is then dedicated to financing capital improvements. Urban renewal agencies have borrowing authority and fund projects by borrowing against anticipated future tax revenue increases from expected development.

Enabled by a 1960 amendment to the state constitution, urban renewal and tax increment financing have been implemented in many Oregon communities. The Oregon Department of Revenue reported that in FY 2006-07 there were 55 active urban renewal agencies in Oregon (within 51 cities and 4 counties), administering 84 URAs. Urban renewal revenue recovered during that fiscal year by the renewal agencies totaled nearly $165 million.

Portland has used TIF for transportation infrastructure projects several times. Gateway Regional Center (658.5 acres) was designated a URA in 2001. Transportation improvements were an integral part of the Gateway URA revitalization plan. The Portland Development Commission (PDC) was authorized to raise as much as $164 million using TIF through the expiration of the URA in 2022. Planned or completed transportation projects in the Gateway URA include light rail expansion, intersection improvements, streetscaping and transit center redevelopment.

In another TIF application to transportation, PDC designated the Interstate Corridor URA (3,769 acres) in 2000. Up to $335 million was authorized for the area using TIF. According to the PDC, one goal of the Interstate Corridor renewal plan is to "Improve transportation corridors to encourage the use of alternative modes of travel, maintain and improve access, create a pedestrian-friendly environment, and mitigate traffic impacts associated with new growth."

ORS Chapter 457 regulates the creation of URAs in Oregon, including some limitations. First, areas to be designated as URAs must meet the definition of "blight," defined as "areas that, by reason of deterioration, faulty planning, inadequate or improper facilities, deleterious land use or the existence of unsafe structures, or any combination of these factors, are detrimental to the safety, health or welfare of the community." The "inadequate or improper facilities" criterion provides a statutory basis for creating a URA to finance transportation improvements. And there are limits on the total land area and total assessed value that a jurisdiction can include in a URA, depending upon the population of the jurisdiction.

Despite successes using TIF for selected transportation improvements, there are some complexities to consider. TIF revenue is vulnerable to economic downturns; it is most effective when a jurisdiction's tax base is stable or growing. TIF has been criticized for being too complicated for many people to understand. Urban renewal agreements are often extended beyond their original time frames which can create hardships for other property tax funded programs that may have already had increased demand on services from new development in the URA. Lastly, a unique statutory feature of urban renewal in Oregon is that the creation of a URA does not require formal consent of all affected taxing jurisdictions so impacts on schools, for example, may not be considered in the decision to create the URA.

## Reimbursement Districts

Clackamas County and the City of Woodburn have used the reimbursement district concept. In Clackamas County a developer can request recovery of zone of benefit charges with an application to the County within six months of approval of the improvement being financed. Information contained in the application must include the delineation of the zone of benefit and all affected properties, full documentation of costs, and the method for allocating costs to the affected properties.

The zone of benefit recovery charge code was approved by the Board of County Commissioners in 2000. To date, there has been one approved zone of benefit application, involving a developer-funded intersection improvement on OR 212. Zone of benefit recovery charges can also be applied to road improvements funded by

Clackamas County, although the County has not elected to exercise this authority. The term of enforcement of the zone of benefit obligation for affected properties is 15 years.

The City of Woodburn approved a reimbursement district ordinance (*No. 2237*) in 1999, allowing a developer to recover a portion of the cost of a frontage road serving the Woodburn Company Stores (located near the I-5 Woodburn interchange) from subsequent developments abutting the road. The reimbursement district process outlined in the City of Woodburn ordinance is similar to the zone of benefit process adopted by Clackamas County, except that the term over which cost responsibility can be assigned to subsequent development (10 years) is shorter and no reference is made to the applicability of the ordinance to publicly funded improvements.

## 2009 Legislative Concepts

Introduced in the first draft of HB 3379 in the 2009 Oregon Legislature, but not included in the adopted bill, the following concepts were considered by the House Transportation Committee.

### *Sequestration Zones*

The sequestration zone concept would have, for a specified period of time, allowed income taxes collected from properties located within a “Sequestration Zone” to be used to finance a “critical(ly) need(ed)” transportation improvement that “predominantly benefits a particular geographic area.” The proposed language included a formula for determining what part of all personal income taxes and a weighted amount of corporate income and excise taxes would be applied to repayment of bonded debt used to finance transportation improvements.

### *Lottery Backed City Transportation Improvement Fund*

The City Transportation Improvement Fund concept would have created a fund separate from the state General Fund with funds continuously appropriated for use as grants and loans to develop “projects that provide significant economic benefits to the community within the urban growth boundary” of cities. Initial funding would be provided by lottery backed bonds issued by the State Treasurer and repayment of loans and interest earned would maintain the fund. At the request of the Director of the Department of Transportation additional lottery backed bonds could be issued.

# State and Federal Funding

## State Highway Fund

The State Highway Fund (SHF) is supported by taxes on fuel used for propelling motor vehicles and any other taxes levied on the ownership, operation or use of motor vehicles. These include vehicle registration fees, vehicle title fees, and weight-mile taxes on heavy vehicles. Once the new revenue from HB 2001 (2009) is fully phased-in, the SHF is expected to receive just over $1 billion per year. When both formula and program distributions are considered, cities and counties will receive about half of this amount, with ODOT receiving the other half.

The use of SHF revenue is restricted to “the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas in this state.” This includes bicycle, pedestrian and parking facilities that are part of the highway right-of-way. The State Highway Fund cannot be used to subsidize transit operations, purchase buses, or pay for passenger rail investments. The overwhelming majority of dollars from the SHF are used to pay for the maintenance and preservation of roadways and bridges, along with the debt service related to these programs, at all jurisdictional levels. Currently, only small percentages are used for safety, operations, and capacity expansion projects. The bonding provisions of HB 2001 will noticeably increase modernization expenditures on state highway projects specifically identified in the bill, along with increased debt service expense.

## State Transportation Infrastructure Bank

The Oregon Transportation Infrastructure Bank (OTIB) is a statewide revolving loan fund designed to promote innovative financing solutions for transportation needs. Oregon’s program was started in 1996 as part of a federal pilot program. (Because of the source of initial capital for the OTIB, most loans involve the use of federal funds.) Legislative action in 1997 established the program in state law and expanded the bank's authority.

OTIB provides loans for transportation projects to eligible borrowers, which include cities, counties, port authorities, transit districts, special districts, tribal governments, state agencies, and private for-profit and not-for-profit entities in Oregon. Eligible projects include highway projects, transit capital projects and bikeway or pedestrian access projects. OTIB loans can be used to cover up to 100% of a project’s costs.

Staff support for the program is provided by the Financial Services office of the Oregon Department of Transportation (ODOT). The OTC has final loan approval authority. Projects are selected for OTIB loans based on ratings by staff and recommendations of regional advisory committees. ODOT’s Chief Financial Officer takes these ratings into consideration when recommending loan approval to the OTC. Interest rates for loans depend on the type of loan taken out and on the credit rating of the applicant. Repayment of OTIB loans must begin within five years of project completion and must be complete 30 years from project completion or at the end of the project’s lifespan, if it is less than 30 years.

OTIB capitalization reached $50 million in 2007 and it had not yet issued debt in order to raise additional capital. FHWA (*2007*) reported that as of September 2006, OTIB had completed 19 loan agreements totaling $34.4 million and had disbursed $25.1 million. Clackamas County has been approved for several OTIB loans, including a loan for Sunnyside Road Phases 2 and 3, as well as another for bridge and road projects. Clackamas County plans to use transportation SDC revenues to service its OTIB loans. The Rogue Valley MPO reported several regional projects with OTIB loan funding, including an environmental assessment undertaken in connection with the I-5 Fern Valley interchange improvement project and several rail crossing improvements on OR 99 in Central Point.

## Oregon Funding Programs for Local Government

Oregon Programs are typically funded by the Federal Surface Transportation Authorizing Act and targeted to specific program areas or by bonded indebtedness financed by existing revenue streams.

### *Annual Federal Appropriations*

Appropriations projects direct federal funds to local communities to meet their needs, and invest in the local economies. Each year, requests are submitted to members of Congress for consideration as part of the annual federal spending bills. Requests are submitted to an Oregon Senator for review and then forwarded for funding consideration to the Senate Appropriations Committee, and that Committee will then select a limited number of projects to fund from each state.

### *Local Government Program*[xi]

Transportation in Oregon is a cooperative effort involving all levels of government. Together with local partners, ODOT helps identify and establish priorities for road and bridge needs of each responsible agency. The agencies address these priority needs subject to the allowed uses of available funds. ODOT continues to share funding based on the priority needs. About 25 percent of the federal funds that come to Oregon support local programs.

### *Fund Exchange*

The State can make funds available to individual cities and counties for the exchange of flexible federal funds. The amount of funds available for exchange is determined annually. Exchanging federal funds for state funds helps local agencies avoid complicated federal contracting regulations. Exchanged funds may be used for all phases of a specified capital improvement within the roadway right-of-way, but are not intended for maintenance.

### *Special City Allotment*

There is $1 million in state gas taxes mandated to be distributed annually among cities with populations of less than 5,000. ODOT sets the distribution and dollar amount by agreement with the League of Oregon Cities. Half of the funds come from the cities' share of gas tax revenues and half comes from ODOT's share of the State Highway Fund. Local governments can receive one-half the maximum

$25,000 grant amount, up front, with final payment due upon completion of the project. Payments are included in the expenditure budget for Local Government in the Highway Program.

### *Transportation Enhancement*
Provides federal highway funds for projects that strengthen the cultural, aesthetic, or environmental value of our transportation system.

### *Safe Routes to School*
The program provides funding for projects that promote walking and bicycling to school and facilitate the planning, development and implementation of projects and activities that will improve safety and reduce traffic, fuel consumption and air pollution within two miles of the school. For example, in February 2010 ODOT approved eight projects for a total of 3.2 million dollars.

### *Public Lands Highways Program*
The program provides funding for transportation planning, research, and engineering and construction of highways, roads, parkways, and transit facilities that are within, adjacent to, or provide access to Indian reservations and Federal public lands, including national parks, refuges, forests, recreation areas, and grasslands.

### *Oregon Immediate Opportunity Fund*

The program provides grant funding for street or road improvements to influence the location, relocation or retention of a firm in Oregon, revitalize business or industrial centers, and prepare Oregon Certified Project Ready Industrial Sites.

### *National Scenic Byways*
The program provides grants for projects that benefit the byway traveler's experience, manage the intrinsic qualities that support the byway's designation, shape the byway's story, interpret the story for visitors, or improve visitor facilities.

### *Bicycle and Pedestrian Grant Program*
A competitive grant program providing roughly $5 million to Oregon cities, counties and ODOT regional and district offices for design and construction of pedestrian and bicycle facilities.

### *Connect Oregon III*
The third cycle of lottery bond-based funding, providing $100 million to improve Oregon's transportation system through multimodal investments, other than highway investments, such as facilities for transit or freight. An example from the Connect Oregon II program is the Prineville Railroad Freight Depot, a 3.5 million dollar project.

### *Access Management Bond Fund (AMF)*

A state bonded fund for access improvements necessary for safety or economic development purposes where other project funding is not available or timely. The purpose of the AMF is to increase financial support for access management improvements not associated with STIP projects, enhance access management outcomes in STIP project delivery, and add to the statewide inventory database.

### *Local Street Network Program*

A one-time program that spent 30 million dollars over a four-year period to improve local street networks.

## Build America Bonds (BAB)

Traditionally, tax-exempt bonds provide a critical source of capital for State and local governments, but the recent financial crisis sharply reduced their ability to finance new projects. In response, Congress created within the American Recovery and Reinvestment Act (P.L. 111-5) (Recovery Act) (and extended in the Hiring Incentives to Restore Employment Act) a new innovative financing tool: Build America Bonds (BABs). These bonds, which allow a new direct Federal payment subsidy, are taxable bonds issued by State and local governments that give them access to the conventional corporate debt markets. At the election of the State and local governments, the Treasury Department makes a direct payment to the State or local governmental issuer in an amount equal to 35 percent of the interest payment on the BAB. As a result of this Federal subsidy payment, State and local governments will have lower net borrowing costs and be able to reach more sources of borrowing than with more traditional tax-exempt or tax credit bonds. Since April 2009, State and local governments issued a total of $28.5 billion in BABs to be used for highway and transit projects across the nation.

# Developer Contributions to Transportation Improvements

One important aspect of land use planning in Oregon is planning for adequate infrastructure. Statewide Land Use Planning Goals 11 and 12 require local jurisdictions to provide “timely, orderly and efficient” public facilities and services and to “encourage a safe, convenient and economic transportation system.” When the timing of proposed private land development is not in sync with the planning and construction of adequate facilities, developers can sometimes be required, and often may choose to pay a fair share for or build transportation improvements to protect and improve the function of the transportation system. This section describes the context within which developers participate in the mitigation of development impacts on the transportation system.

## Conditions of Approval of Land Use Development Proposals

The extent of the requirements that a local government can apply as conditions of approval is limited by what the local code requires or allows, state regulations, and the

constitutional limits established in case law, primarily the Nollan and Dolan requirements.

In the Nollan case (Nollan V. California Coastal Commission, 483 U.S. 825 (1987)) the U.S. Supreme Court held that a condition of a land use approval, while serving a legitimate public interest, was not reasonably related to the impacts of the proposed land use. This case established that a "nexus" or reasonable relationship must be established between conditions of approval and the anticipated impacts of a development.

In Dolan (Dolan v. City of Tigard, 512 US 687 (1994)), the U.S. Supreme Court found that the local government's requirements for a land use approval were reasonably related to the land use request, but were not demonstrated to be proportional to the anticipated impacts. Conditions must be "roughly proportional" to the impacts of the proposed development.

Local development codes support mitigation of developer impacts on transportation facilities when they require adequate facilities, traffic impact studies and coordination with transportation facilities and services providers, including transit districts, other local jurisdiction and ODOT. Conditions of approval to meet these ends are legally defensible when they are reasonably related to project impacts and roughly proportional to the extent of those impacts.

## Negotiated Mitigation Agreements

In some cases ODOT has successfully negotiated agreements with developers to provide funding, right-of-way and/or construction of improvements to mitigate anticipated problems through voluntary agreements. The best results are achieved when the developer understands the benefits to their customers of improved highway operations.

The negotiation process is currently informal. There are several reasons that this type of negotiated agreement is not typically formalized in state laws: developer contributions cannot be anticipated in the budgeting process for facility improvements and the agreement process benefits from a high level of flexibility to allow consideration of multiple variables such as the types of impacts, local economic development needs, urgency of mitigation, etc.

Technically, Mitigation Agreements are voluntary, but because ODOT can appeal the local land use decision if it is not consistent with the local development code, such agreements may not be perceived as voluntary. Legal issues that apply to other types of conditions of approval should also be applied here, though the legal hurdles appear to be lower. Even though the private parties to such agreements participate voluntarily, constitutional limits on exactions should be used as the test whether a condition is fair, reasonable and legally defensible.

It is important that a negotiated mitigation agreement be backed up by a good record of:

- How the transportation system impacts were quantified;
- How mitigation measures were identified; and
- Generally, how the parties reached agreement.

Mitigation Agreements are Contracts***:***

- The agreement authority, if not part of a permit process, is ORS 366.425;
- If the developer is supplying funds to ODOT to construct the improvement, then ODOT can accept the funds under an ORS 366.425 cooperative improvement agreement (CIA);
- If a developer intends to do the construction of the improvement, there are costs involved in ODOT reviewing and approving plans;
- If a developer intends to do the construction of the improvement, any improvement that will be a state facility must be built according to state public contracting laws, including BOLI prevailing wage rates. (*See* ORS 276.071)

## Access Management and Approach Permitting

For many states including Oregon, the permitting process for connections to state highways creates the primary opportunity to mitigate the impacts of development on state facilities. Where a development proposal includes a request for direct vehicular access onto a state highway facility, the permitting process enables ODOT to ask for mitigation of adverse effects on the transportation facility as a condition of approval of the approach permit.

Where no direct access to the state facility is requested, this approach will not be available unless there is some provision that indirect impacts of new traffic generators can also be regulated. For instance, in Oregon a new permit review process is required where a “change of use” of an existing permitted approach occurs. If an existing driveway will be shared with a new traffic generator or the existing land use is intensified, that change might constitute a change of use. Oregon’s access management rule, OAR 734-051, defines “change of use” and regulates changes of use for existing, permitted ***private*** driveways. Recent statutory changes minimize permitting requirements for ***public*** street connections to the highway.

> *Mitigation Proposals***:** An Oregon subset of the access management tools mentioned above, a mitigation proposal is similar to a proffer as used in other jurisdictions, such as Virginia (see next section). Mitigation proposals are plans and offers of mitigation measures from developers in support of their approach road permit applications, while proffers are developer offers that support local land use applications.

Mitigation measures may include funding for or physical improvements to state facilities in order to address safety concerns and to protect the capacity and operations of the facility. OAR Chapter 734, Division 51, provides for mitigation when use or configuration of a *private* driveway changes. And other statutes, including ORS

Chapters 373 and 374, require cooperation between local jurisdictions and ODOT when local facilities impact state highways.

## Differences in State vs. Local Authority

Land use and transportation planning in Oregon are coordinated, but the roles of local government and ODOT in implementing plans are quite different. Comprehensive land use planning and land use decision making are under the authority of local jurisdictions. ODOT's authority starts at the point of connection to a state transportation facility. ODOT has a responsibility to protect the safety and operations of the state highway system which includes managing the impacts of land use changes on highways. ODOT's authority is primarily implemented through the Highway Approach Permitting process.

ODOT reviews all land use notices received to identify proposals that may have adverse impacts on state facilities. Where no adverse impact is likely, there is no further action taken. Where existing or potential problems are identified, ODOT becomes a party to the local decision and helps find solutions that are fair and effective.

Threshold Issues for ODOT to become involved in Local Land Use Decisions include:

- There are operations, safety, or access issues related to the land use application**;**
- The timing of land development and scheduled transportation improvements can be coordinated to reduce risks;
- The project is very large, will substantially increase truck trips, will generate many jobs that will add trips to peak hours and/or will attract many customer trips.
- The affected state facility is currently operating within ODOT standards, but the proposed project will take it out of compliance; or
- The affected state facility is already or will be operating below standards and ODOT has to ensure that it is not further degraded by the proposed development.

ODOT participates in development review to encourage local jurisdictions to address state highway concerns and compliance with the Transportation Planning Rule during the land use process. This often results in applying conditions of approval to help maintain the function of state highway facilities and developing workable mitigation agreements.

# Overview of Other Approaches

Other states have developed additional financing methods or variations on methods that are used in Oregon. The following examples start with methods closely related to the development review process then progress through financing mechanisms for capital improvement programs.

## Proffers

In some states, particularly Virginia and Maryland,[xii] local planners expect developers to "proffer" their intended contributions to build or improve infrastructure in support of their applications. Since a common component of a proffer is an improvement to a state transportation facility, the DOT is a participant in any negotiations regarding the nature, scale and design (or dollar amount) of the proffer. Developers are encouraged to recognize the facility needs that will affect their customers and their relationship to a community, and Maryland DOT planners say developers respond positively when advised in this manner.

## Development Agreements

As used by several states including Hawaii, Washington and Florida, Development Agreements are developed early in the site planning process, and private developers commit to contribute to substantial infrastructure projects in exchange for certain guarantees for their projects. For example, the local government might make assurances that any ordinance amendments adopted after the effective date of the agreement will not apply to their project if certain steps in the development process are accomplished by specified dates. Where this type of development agreement is not backed up by statute, it is likely to constitute "contract zoning," a term applied to private leveraging of a zoning decision to benefit individual properties or owners, akin to the concept of "spot zoning," both of which the courts have found to be illegal. However, where enabled by law, development agreements are voluntary, so the constitutional tests of a nexus and proportionality are likely moot. [xiii]

## Value Capture (New York, Texas)

As defined in the Oregon methods section above, value capture relates fees charged to system users to the projected positive increase in property values that is created by the proximity and utility of the public infrastructure improvement. The financing mechanisms actually employed can include tax increment, LID, and other forms of financing. Applications of value capture financing have been limited to local governments and have been primarily employed in financing transit system improvements. For transit projects, value capture works by taxing a portion of the additional value of adjacent properties that result from transit accessibility.[xiv]

The concept can also be applied to financing state highway improvements. One example is a $128 million improvement along a nine mile corridor of I-87 near Albany, New York. The estimated present value of capitalized benefits from the I-87 improvement to properties within two miles of the corridor totals over $3.7 billion.

In 2007, the Texas Legislature authorized value capture financing of state highway improvements. The provisions of the legislation call for the creation of transportation reinvestment zones (TRZs) to delineate properties whose value would be affected by transportation improvements. The legislation envisioned a tax increment financing mechanism for capturing the improvement-related benefits to existing development, and allow for application of improvement-specific impact fees to capture the benefits to new development.[xv] There is a key difference between Texas' value capture tax increment mechanism and tax increment financing in urban renewal. In the Texas program, revenues are drawn from the increment above a projected trend tax base, while in urban renewal revenues are drawn from the increment above a frozen tax base. In the Texas program, the trend represents the expected evolution of the tax base without the transportation improvement.

Although there is growing interest in value capture financing of state transportation improvements, it should also be acknowledged that most state governments are now more than a century removed from the general practice of levying taxes on real property. Reaching agreement with local governments on apportioning locally levied taxes (related to capitalized benefits from state facility improvements) would be difficult. Oregon has a general framework for coordinated planning among state and local entities, which is the basic foundation required for using value capture as a finance tool. Specific financing agreements need to be in place early in the project planning process in order to capture "anticipatory" gains in property value.

## Transportation Improvement Districts (Colorado, Virginia, Florida)

Similar in structure to an LID, a transportation improvement district (TID) is created by designating an area as a special funding district in order to provide transportation infrastructure. TIDs are typically undertaken in high growth areas where infrastructure needs cannot be met through the capital programs of local or state transportation departments. TID funds are obtained from assessments on existing property in the district. While property values are typically used as the basis of assessments, the revenues collected are not interpreted as property taxes. Instead, "they are considered non-ad valorem assessments based on benefits to the property from district expenditures, because benefits are presumed to be proportional to property values." [xvi]

Although TIDs have been primarily concerned with financing improvements to local transportation infrastructure, there are instances where they have been organized to finance improvements in state transportation facilities. One of the earliest examples was the 1981 creation of Denver's Joint Southeast Public Improvement Association (JSPIA) TID among commercial property owners located in a five mile suburban corridor along I-25. Over time, funds recovered by the JSPIA TID were used by the Colorado Department of Transportation to cover two-thirds of the cost of improvements to five interchanges and one overpass located in the district.

A second example is the 1987 formation of the Route 28 Highway TID in Loudoun and Fairfax Counties, Virginia. The purpose of this TID was to recover revenue from commercial property assessments to accelerate planned improvements to State Route 28, to provide better access to Dulles International Airport. Under a contract with the TID, Loudoun and Fairfax Counties agreed to levy an additional tax assessment, collect

the tax, and transfer the revenue to the Commonwealth Transportation Board. TID tax revenue was combined with county revenue from state gas tax allocations to service debt on bonds issued by the state to finance the Route 28 improvements.

A final example is the creation of a TID in Port St Lucie, Florida to wholly finance construction of an interchange on the Florida Turnpike (*Tollroadsnews 2007*). In this case, the TID consisted of two large developers, whose intentions were to improve Turnpike accessibility to their nearby projects. The TID provided $7.8 million of the $20.0 million cost of the project up front, with the remainder consisting of borrowed funds to be repaid by a levy imposed on property sales from their developments. The TID was administered by the City of Port St. Lucie.

## Transportation Concurrency (Florida, Maryland)

Concurrency requires that certain necessary public facilities must be built, funded or otherwise committed on the day of opening of new private development projects. Oregon does not require concurrency at the state level. Some Oregon cities and counties have concurrency requirements, for instance Medford and Washington County, as allowed by the TPR, to protect and maintain their local transportation systems.

Adequate Public Facilities Ordinances is a term often used to describe local ordinances that implement concurrency requirements. In 1991 one third of California counties had adequate public facilities requirements covering a variety of facilities and typically including transportation facilities. Under the statewide growth management systems in Washington and Florida municipalities adopt adequate public facilities ordinances, and 13 of Maryland's 23 counties and 12 municipalities have them. In Maryland and Virginia the ordinances tend to be inconsistent from county to county and city to city, and the development community has called for more consistency and alternative funding for facilities to avoid de facto moratoria in areas where public investment is not keeping up with development pressures.

Prior to development, a jurisdiction must determine the adequate level of service for an area and then assess whether infrastructure demands created by new development would exceed existing capacity. If there is insufficient existing capacity, "… the developer must provide the necessary facility or service improvements to proceed, provide a monetary contribution towards such improvements, or wait until government provides the necessary improvements," [xvii]

Concurrency is used in Maryland, New Hampshire, Washington, and Florida. The state of Florida "mandates adequate public facilities through its concurrency requirement, forbidding the issuance of a land development permit that would cause level of service standards to fall below those adopted in the Comprehensive Plan."[xviii]

One of the key problems with concurrency is that it gives earlier developers the advantage of being able to use up capacity without paying, whereas later developers are penalized. One study concluded that there are several undesirable consequences of Florida's transportation concurrency program. First, concurrency encourages developers to seek out locations where existing transportation infrastructure can support additional growth, typically on the periphery of metropolitan areas, thus encouraging sprawl. Second, developers' option of "buying out" of concurrency requirements,

coupled with traffic impact fees, erodes housing affordability. Lastly, concurrency can never be reasonably achieved in the present era of widespread traffic congestion. Capacity improvements made to satisfy concurrency requirements will be quickly absorbed by rescheduled, diverted, and induced travel. [xix]

## Transportation Corporations (Missouri)

Transportation corporations are nonprofit organizations formed by citizens and local governments to plan and develop transportation projects. The ability of transportation corporations to work on projects varies from state to state, and currently only a few states allow for the establishment of transportation corporations, including Texas, Missouri and Florida (*Williams 2006*). Transportation corporations work to secure financing for planned projects that have wide public support, in order to speed up the programming timetable.

In Missouri, transportation corporations can raise money by soliciting donations, issuing tax-exempt bonds, and charging and collecting tolls, but they are not allowed to collect taxes. An example from Missouri is the Highway 63 Transportation Corporation, formed in 2000 to raise funds for upgrading a 22-mile state highway segment connecting the cities of Macon and Kirksville.[xx] Corporation membership for this project included private residents, an area chamber of commerce, three counties, and four cities. Corporation funds for the project were obtained from a voter-approved sales tax increase (in Kirksville) along with voluntary contributions from the other Corporation members.

## Washington State's Growth Management Act

Washington's 1990 Growth Management Act is their foundation for land use and transportation planning and includes a range of planning and financing methods. The Act includes a concurrency provision that transportation strategies or improvements must be in place at the time of development or that financing be in place to achieve the improvements within 6 years. Local governments participating in the GMA planning program have to deny development applications where transportation facilities are inadequate to serve the needs of the proposed development on the day of opening, unless mitigation could be in place or financed in a timely manner.

This requirement applies only to transportation facilities under the direct jurisdiction of the city or county and state facilities of regional significance; not state highways of statewide significance, except in island counties where they are often the primary arterial.

Local plans include state facilities in their transportation inventories, with projections of the impacts on state facilities of the land use and growth assumptions in the plan. Clark County, Washington requires traffic impact analysis (TIS) for local land use decision making (with exceptions), and has established thresholds for study area sizes related to trip generation, plus other basic requirements for scoping and development of a TIS.

Washington enables development agreements related to land inside the city or outside the city prior to annexation or in conjunction with a service district agreement (RCW 36.70B.170). Such agreements vest the conditions of the agreement for a time specified in the agreement. Conditions of development agreements may include

mitigation measures, design standards, development conditions and other appropriate conditions and procedures. Authority is also reserved to impose "new or different regulations to the extent required by a serious threat to public health and safety."

Washington also enables "latecomer" (reimbursement) agreements, providing that when a developer invests more than a proportionate share of the cost of a facility, future developments may be charged their fair share with a reimbursement to the original investor. Because of the variety of factors that may delay subsequent development, in a 2006 House Bill the state legislature extended the time period effective for latecomer agreements to fifteen years with the possibility of extension (EHB 3192).

As a part of the WashDOT's economic development function, state facility construction projects get higher priority for state funding when there is a local and/or private contribution to the costs of the project.[xxi]

In an effort to further protect state facilities, in 2005 a bill passed in the Washington State Senate allowing that the DOT "may impose mitigation or mitigation fees on development activities that create additional significant demand and need for improvements to highways of statewide significance and related facilities or to state highways in an urban growth area." However the bill did not pass in the state House. This is noted here as a sign that Oregon is not the first state to try to have developers mitigate the impacts of development projects on state highways, and that at least one state has drafted legislation to address the issue directly.

## Arizona's New Revitalization District Legislation

In March 2010 the Arizona legislature adopted their HB 2003 allowing the creation of a new type of special taxing district allowing developer financing of public infrastructure improvements to serve properties inside the district. Like a fire district or irrigation district, a revitalization district has a board of director's and other governance structure of a municipal corporation. Creation of a district is subject to petition by 51% of property owners and by the owners of 51% of the total property value within the district. The city, tribal area and/or county where the district is located shall be represented on the board at least until the district plan and bylaws are in place. The district plan is subject to standards applied to land use in the affected jurisdictions, along the lines of a specific area plan in Oregon.

Arizona is a property tax state, with its median residential tax liability roughly two-thirds the median amount in Oregon. Collection of taxes for a revitalization district is done in the same way it is done for other properties and special taxing districts. Tax revenues are disbursed to the district which has bonding authority. Revitalization districts do not have eminent domain authority and improvements financed by the district must be public. The district sunsets in ten years unless a reauthorization process is completed. This legislation was initiated to help a specific area in Scottsdale but is available to any city or tribal area.

# References

[i] FCS Group, Establishing Defensible System Development Charges
[ii] Nicholas, J.C., Nelson, A.C., and J.C. Juergensmeyer. 1991. A Practitioner's Guide to Development Impact Fees. Chicago, IL: Planners Press, American Planning Association.
[iii] AECOM Consult. 2007. Evaluation of Impact Fees and Value Capture Techniques. Briefing paper prepared for the National Surface Transportation Policy and Revenue Study Commission, Washington, DC.
[iv] Dueker, K.J., Rufolo, A.M. and C. Lawson. 1993. Congestion Management: Travel Behavior and the Use of Impact Fees. Volume II: Traffic Impact Fees: Issues Regarding Calculation and Efficiency. Final Report 93-06.2.
[v] Strathman, James G and Elizabeth Simmons: Financing Mechanisms for Capital Improvements: Interchanges. SPR 687. Oregon Department of Transportation Research Section 2010
[vi] Springer, C.D. and J. Ghilarducci. 2004. Transportation utility fee: Oregon experience. *Transportation Research Record: Journal of the Transportation Research Board*, No. 1895, TRB, National Research Council, Washington, D.C., 2004, pp. 15-24.
[vii] League of Oregon Cities, 2007.
[viii] Goldman, T. and M. Wachs. 2003. A quiet revolution in transportation finance: The rise of local option transportation taxes. Transportation Quarterly, 57:1, 19-32.
[ix] League of Oregon Cities. 2007. Implementing a Local Gas Tax: A Survey on City Gas Tax Ordinances. Salem, OR: author.
[x] Goldman and Wachs
[xi] http://www.oregon.gov/ODOT/HWY/LGS/funding.shtml#Local_Government_Program
[xii] Personal communications with Maryland DOT staff, 2006
[xiii] Bargaining for Development: David L. Callies, Daniel J. Curtin and Julie A. Tappendorf, Environmental Law Institute, Washington D.C.
[xiv] Smith, J.J. and T.A. Gihring. 2006. *Financing Transit Systems Through Value Capture: An Annotated Bibliography*. Victoria Transport Policy Institute, Victoria, BC.
[xv] Vadali, S.R., Aldrete, R.M. and A. Bujanda. 2009. Financial model to assess value capture potential of a roadway project. *Transportation Research Record: Journal of the Transportation Research Board,* No. 2115, pp. 1-11.
[xvi] AECOM Consult. 2007. *Evaluation of Impact Fees and Value Capture Techniques.* Briefing paper prepared for the National Surface Transportation Policy and Revenue Study Commission, Washington, DC.
[xvii] Williams, K.M. 2006. *Alternative Funding Strategies for Improving Transportation Facilities*. Prepared for North Carolina Department of Transportation. Center for Urban Transportation Research, University of South Florida, Tampa, FL.
[xviii] Freilich, R.H. and S.M. White. 1994. *Access Management and Land Use Planning.* Access Management Seminar, New York State Department of Transportation, Government Law Center of Albany Law School, May 3,1994.
[xix] Downs, A. 2003. Why Florida's concurrency principles do not – and cannot – work effectively. *Transportation Quarterly,* 57, 13-18.
[xx] National Council for Public-Private Partnerships. 2009. *The Highway 63 Transportation Corporation.* Arlington, VA: author. Accessed at http://www.ncppp.org/cases/hwy63.shtml_on November 23, 2009.
[xxi] Funding Infrastructure in Other States http://cga.ct.gov/pri/archives/2000edreportappenG.htm